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No. 09-309

Supreme Court, U.S.
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In The

Supreme Court of the United States

tw telecom of oregon llc,

Petitioner,

v.

City of Portland, Oregon,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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Petitioner, tw telecom of oregon (TWT), asks this Court to review an unpublished decision by the Ninth Circuit Court of Appeals. In its decision, the circuit court declined to apply the Telecommunications Act of 1996, 47 U.S.C. §253, to preempt the City of Portland's (City or Portland) operation of a governmental telecommunications system or to preempt a street-use franchise between TWT and Portland. Under the franchise, TWT is granted use of all City streets for its telecommunications facilities. In return, it pays the City a "franchise fee" and has certain other obligations.

The district court decided the matter on cross-motions for summary judgment on the basis of undisputed facts identified by the district judge and discussed in some detail in the district court opinions. The record was substantial and included declarations from 22 fact witnesses, six experts, and nearly 1,700 pages of exhibits.[1] The Court of Appeals issued its unpublished opinion, affirming in part and reversing

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[1] The district court issued two opinions in the case. One is attached to TWT's petition as Appendix B. *Time Warner Telecom of Oregon v. City of Portland*, 452 F. Supp. 2d 1084 (D. Or. 2006). The second opinion is found in the appendix to this response in opposition. 452 F. Supp. 2d 1103 (D. Or. 2006). Additionally, the district judge adopted by reference the Oregon district court's analysis in another very similar franchise preemption case, *City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049 (D. Or. 2005). In what follows, the City will also cite to parts of the appellate court's record, including the Qwest Excerpt of Record (QER), the City's Supplemental Excerpt of Record (SER), and the Appellants' Addendum (ADD).

in part, on April 8, 2009. 2009 WL 965816. Petitioner's Appendix 1a-5a.

The Court should deny the petition for certiorari. The Ninth Circuit opinion neither creates a conflict among the circuit courts nor otherwise raises significant legal issues. In addition, TWT's petition (along with the brief of amicus Qwest Corporation) misrepresents the record below. In doing so, it evidently seeks to obscure the real nature of the case and the lower court opinions. The district court largely found against TWT, on undisputed facts developed from a substantial record, using a legal standard proposed by TWT itself. After months of litigation, the district court concluded that the undisputed facts could not support TWT's claim that the City's actions "prohibited" or even "may prohibit" TWT from providing telecommunications in the local market. The Ninth Circuit's unpublished memorandum opinion does nothing more than apply to the same facts a preemption test that is (a) consistent with the standards under the Telecommunications Act announced by the Federal Communications Commission; (b) consistent with the rules applied by all the other circuits; and (c) identical to the standards this Court declined to review last term in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2860 (2009). Further, the Ninth Circuit interpretation of the Tax Injunction Act (TIA) to foreclose a federal court challenge to the City's franchise fee is similar to that of all other circuit courts that have addressed the question.

I. INTRODUCTION, SUMMARY OF PROCEEDINGS BELOW

TWT and another telecommunications firm, Qwest Communications Corporation (QCC), sued Portland, Oregon, under the Telecommunications Act of 1996, 47 U.S.C. §253. In their suit, they sought preemption of certain provisions in their own street use franchises, parts of the franchises of 19 other communications providers, who were not parties to the case, and contracts between the City and other governmental agencies for the sharing of telecommunications facilities. They also challenged the arrangements under which the City provides communications to other local governments and schools, both through its own fiber-optic system and in cooperation with the local cable company, Comcast Corporation. Qwest Corporation (Qwest), an affiliate of QCC, joined the case a year after it was filed. Neither Comcast nor the other governments were named as defendants.

The district court ruled early that plaintiffs could not seek to preempt the City's contracts with third parties unless they were brought into the case. The plaintiffs declined to join those other parties. Nonetheless, plaintiffs continued to criticize contracts held by non-parties, pressed for the "preemption" of the City's use of franchise compensation from non-parties, and attacked City operation of its own communications system and its contractual arrangements with Comcast.

In the end, TWT's central §253 claims against the City were: (1) The City's 5% gross revenue franchise fee should be preempted under §253 because it prohibits TWT from providing telecommunications services, even though TWT operates successfully in the Portland market and merely passes the 5% fee on to its customers; (2) The provision of the City-TWT franchise under which TWT may be required to provide "in-kind" compensation (in the form of extra underground duct work for City use) prohibits TWT from providing telecommunications, even though the City had never asked for and TWT had never provided any in-kind duct to the City; (3) City operation of its own communications network (known as IRNE), built using some in-kind duct provided by other companies, but not TWT, to provide data transmission services to other governmental entities prohibits TWT from providing telecommunications services because the entities obtaining less expensive services from the City were not buying more expensive TWT services; (4) City agreements with the local cable television company, Comcast, jointly to operate an "institutional network" owned by Comcast (known as the INET) to provide communications services to other governments (arrangements expressly permitted by the Cable Communications Act of 1984, 47 U.S.C. §§531, 544), prohibit TWT from providing telecommunications services to those governmental entities who choose to use that network rather than TWT's.

In ruling on the preemption claims before it, the district court applied the broad standards laid down by the Ninth Circuit in the case of *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002), *overruled by Sprint Telephony PSC, L.P. v. County of San Diego*, *supra*. In *Auburn*, the Ninth Circuit held that local legal requirements should be preempted under §253 if they "prohibit or *may prohibit*" the provision of telecommunications services by any entity. Put simply, the district court found that the undisputed facts could not even support plaintiffs' claim that they "may be prohibited" from offering telecommunications by anything the City did.

On the issue of TWT's contractual obligations, including the 5% franchise fee, the district court concluded that those obligations did not adversely affect TWT's ability to operate or even that the obligations "may have the effect of prohibiting the provision of . . . telecommunications." Petitioner's Appendix 33a. The district court noted, for instance, that TWT's revenues in the City had doubled in the first two years it operated in Portland. Petitioner's Appendix 13a. In the same two years, Portland had become one of TWT's top ten urban telecommunications markets. SER 024-025, 052-056. TWT presented no evidence that paying a franchise fee made its operations "uneconomic and impractical," *In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14,191, 14,209 (1997), that the fees caused a "massive increase in [the firm's] costs," *Qwest Corp. v. City of Santa Fe, New Mexico*,

380 F.3d 1258, 1271 (10th Cir. 2004), or that the fees would reduce TWT's profits by a "substantial" or "significant" amount. *Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18-19 (1st Cir. 2006).[2] Finally, and in any case, based on the extensive record, including expert economic testimony, the district court found that the City's franchise fees were "fair and reasonable compensation" for use of the rights-of-ways. Petitioner's Appendix 34a.

In response to TWT's challenge to how the City used the City's own property, operated the City's own telecommunications system, and worked with the local cable company, the district court held that such actions were not "local statute[s] or regulation[s] or other . . . legal requirements" subject to review and preemption under §253. Further, even assuming that such non-regulatory actions were subject to preemption review, the district court concluded that none of the City's actions prohibited or may prohibit TWT from providing telecommunications services. The winning and losing of particular customers, it held, is competition, not a legal prohibition. Petitioner's Appendix 23a.[3] Finally, and in any case, even if

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[2] Dr. Alan Pearce conducted a study of the telecommunications markets in eight comparably sized cities, including Portland. He testified that Portland's was one of the most robust and competitive markets and that "competitive entry has been enabled by the city's pro-competitive policies." SER 221.

[3] The FCC has said essentially the same thing in a slightly different context. *In re Amigo.Net*, 17 F.C.C.R. 10,964, 10,967-68 (2002) (governmental contracting decisions benefitting one

(Continued on following page)

market competition by a local government can somehow be transformed into an action subject to preemption, the district court simply found that the undisputed facts did not support TWT's claims. To the contrary, the district judge:

> accept[ed] the testimony of the City's expert Alan Pearce who stated that IRNE [the City telecommunications operation] is not significant in the market, the IRNE has "no market power, no opportunity to monopolize, no opportunity to predatory price. . . . It can't behave anticompetitively because it isn't big enough or powerful enough."

Petitioner's Appendix 23a.

The district court did, nonetheless, preempt one part of the TWT franchise under the *Auburn* "may prohibit" test. That was the provision under which the City may require that TWT pay part of its compensation in-kind by providing underground ducts for City use. The City has never requested, and TWT has never provided, any duct to the City pursuant to this contract clause. The district court could find no existing impact on TWT of its in-kind obligations but felt constrained to preempt the requirements under

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telecommunication over another are not subject to §253 preemption). The district court's opinion is also consistent with this Court's decisions interpreting laws designed to promote competition. *E.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (allegations of loss of customers or market share not enough to state a claim under antitrust laws).

the broad "may prohibit" test from the *Auburn* case. That case had been read to preempt requirements that granted local governments "unfettered discretion." The district court held that the City's ability to ask for duct in the future, at its discretion, constituted a "prohibition" under *Auburn*.

In the Court of Appeals, TWT never openly challenged the district court's determination of the undisputed facts. Nor has it ever suggested that the district court should have held a trial rather than grant summary judgment or that the case should be remanded to the district court for additional fact finding. Instead, in the Court of Appeals and now before this Court, TWT simply ignores the undisputed facts the district court found material and repeatedly presents as "facts" immaterial snippets from the record that *were* disputed and which the district court did not accept for purposes of its decision. By doing so, TWT evidently hopes to avoid confronting a fundamental reality of this case: the district court rejected the bulk of TWT's claims, based on its determination of undisputed facts, under the very legal test TWT urged upon it, the lenient "may prohibit" test from *Auburn*.

Pending appeal of TWT's case, however, the Ninth Circuit abandoned the *Auburn* test and adopted the more stringent standards enunciated in *Sprint Telephony v. San Diego County, supra*. Having lost in the district court relying on *Auburn's* easy preemption test, TWT could not prevail on appeal under the stricter preemption rules laid down in *Sprint*

Telephony. If TWT failed to convince the district court that Portland's actions "may prohibit" provision of telecommunications services, *a fortiori*, the Court of Appeals could not find, on the same record, that the City's actions worked an "actual or effective prohibition." Similarly, once the "may prohibit" test no longer applied, TWT could not show that an *unimplemented* franchise provision under which the City might someday ask for in-kind conduit prohibited or effectively prohibited it from offering telecommunications.

In addition, the Ninth Circuit declined jurisdiction over TWT's challenge to the City's franchise fee, relying on the Tax Injunction Act. 28 U.S.C. §1341. Applying a test for what constitutes a "tax" under the TIA used by all circuits that have addressed the question, the Ninth Circuit decided that the City's franchise fee was a "tax," protected by the TIA from federal court review.

This Court should decline review of the Ninth Circuit's unpublished opinion in this case. The circuit court relied upon correct and broadly accepted legal standards under both the Telecommunications Act and the TIA. Its unpublished decision breaks no new ground and conflicts with no other circuits. Insofar as TWT's real complaint appears to be with the district court's determination of undisputed facts, TWT has never directly sought review of those determinations nor has it demanded a trial on the merits. In any case, this Court should not spend its time reviewing disputes over the details of a large factual record.

II. RESPONDENT'S COUNTERSTATEMENT OF THE CASE

A. City Of Portland Right-of-Way Management

The City of Portland owns a vast network of public rights-of-way dedicated primarily to transportation. Contrary to petitioner's claims, the City has assessed the value and cost of maintaining the streets. The streets' value was most recently estimated as $9.7 billion. SER 141. Annual City costs just for its transportation department, franchise management, traffic management, water lines, and storm sewer improvements were over $280 million in 2005-2006. SER 331-330.

The City regularly makes its streets available for private uses like gas lines and electric and telephone wires, typically through long-term contracts called franchises. *Northwest Natural Gas Co. v. City of Portland*, 300 Or. 291, 308 (1985). In return, those using the streets for private gain pay the City "franchise fees" and are subject to certain other conditions. Contrary to petitioner's claim, franchises are enforceable only as contracts. Franchise violations are not enforced by any additional civil or criminal penalties.[4]

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[4] Under the City Code, only those ordinances that are codified are subject to enforcement by fine or imprisonment. Portland City Code 1.10.140. Franchises are not part of the City's codified laws.

Also contrary to TWT's assertions, the City's franchise fees do not vary widely from one company to another. Rather, the City has long used two basic fee structures depending on the type of street use a franchise applicant requests. Entities seeking ubiquitous access to any and all City streets typically pay a 5% gross revenues fee. This includes the gas company, electric utilities, cable systems, and several telecommunications providers, including TWT. SER 074-076. Applicants seeking to use only a limited length of street pay a per-foot charge, currently approximately $3.00 per foot. SER 059. Some pipeline firms and eleven telecommunications providers, including QCC, have such "point-to-point" franchises. All franchises are at www.portlandonline.com/index.cfm?c=33150. In those rare instances when a firm occupies the streets without a franchise, it is charged a "privilege tax" similar to the revenue-based franchise fee. Portland City Code 7.12.070.

Qwest Corporation (Qwest), the "incumbent" telephone company, does not have a long-term franchise. Instead, it operates under a temporary revocable permit, the provisions of which it unsuccessfully challenged in *Qwest Corp. v. City of Portland*, 2006 WL 2679543 (D. Or. Sept. 15, 2006), *appeal voluntarily dismissed*, 9th Circuit No. 06-36022. The permit term is one year and must be regularly renewed. Qwest pays a privilege tax of 7% of gross revenues earned from local exchange service (local telephone), a tax rate established by Oregon state law. Or. Revised Statute §221.515 (2009); Portland City Code 7.12.070.

The legislature intended this tax to generate roughly the same revenue as a 5% tax on all Qwest revenue. *Electric Lightwave,* 452 F. Supp. 2d at 1056, *supra*. The fee was upheld in *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1245 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005).

Thus, all utilities, not just telecommunications firms, pay fees to use City streets. The fees are roughly equivalent, depending upon the use rights obtained. Although they are not identical, the district court found that the various fees achieve "rough parity" among the firms, taking into account their different circumstances. Petitioner's Appendix 34a (district court adopts "extensive analysis" from *Electric Lightwave*, 452 F. Supp. 2d at 1068-75).[5]

Additionally, Portland utility franchises have for decades commonly required limited in-kind compensation. When a utility digs a street trench for its own purposes, it may be asked to lay conduit or wire for City use. Companies only provide conduit along routes they are otherwise building for their own purposes. TWT Franchise §9; 2ADD00031. The more

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[5] TWT presented some evidence, based on a very limited sample of revenue estimates, that were TWT charged Qwest's permit rate, or Qwest charged TWT's franchise fee rate, the resulting absolute dollar payments by the firms would differ from those paid currently. *See* Petition at 7. TWT presented no evidence, however, that the differing fees had any material economic effect on TWT's operations, and certainly no effect constituting an "actual or effective prohibition."

right-of-way a company uses, the more in-kind duct it will typically provide. The City uses the in-kind contributions for several purposes, including carrying traffic control cables and communications fibers. SER 019-022, 059-060, 082-084. City in-kind requirements parallel compensation arrangements in many other public and private rights-of-way agreements. SER 158-184, 221, 277-305. The City has never requested and TWT has never provided in-kind conduit. Petitioner's Appendix 9a.

With the exception of the TWT in-kind obligation, the district court found that the City's franchise fee system represented "fair and reasonable compensation" for right-of-way use. Petitioner's Appendix 34a-35a.[6]

B. IRNE

IRNE, the "Integrated Regional Network," is the City's own communications system, established primarily to provide City agencies with telephone and data services. IRNE is not separate from the City. Petitioner's Appendix 8a. To create IRNE, the City invested $11 million in new facilities, contracted to share fiber-optic cable with other governments, and

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[6] An expert economist testified that the City's franchise fees, including in-kind contributions, are "fair and reasonable [compensation] . . . reflect[ing] the relevant market value of the [right-of-way]." SER 187. QCC's expert opined that municipal rights-of-way should be treated as an economic "free good," for which no compensation need be paid.

pulled City cable through some conduits previously provided as franchise in-kind compensation. *Id.*

The City also uses IRNE to sell data transmission services to several other government and law enforcement agencies. Petitioner's Appendix 10a. Annual revenues from the sister governments are about $83,000. *Id.*

Although it is part of the City, IRNE operates in City streets under a franchise and pays a 5% franchise fee on the $83,000 it derives from non-City entities. *Id.* Contrary to Qwest's assertions, IRNE's in-kind obligations are more rigorous than private franchisees. Any City agency may use all IRNE's "surplus conduits or ducts" and all IRNE's "lit optical fiber network." IRNE Franchise §9; 3ADD0054.

While about 11% of IRNE's system length utilizes in-kind conduit provided by telecommunications franchisees, none of that conduit was provided by TWT or any other party to this litigation. Petitioner's Appendix 9a. Contrary to TWT assertions, the record showed that the in-kind conduit did not significantly reduce IRNE's costs or prices. The district court found the value of the in-kind conduit is "only . . . a small fraction of the City's total investments in IRNE," Respondent's Appendix 4a, and that in-kind

contributions did not provide the explanation for IRNE's "low" prices. *Id.*[7]

C. INET

The INET (the Institutional Network) is not part of IRNE and not part of the City. All INET facilities, including the wires in City streets, are owned by Comcast Corporation as part of its cable system. Under the Cable Communications Act, 47 U.S.C. §§531, 544, localities may require cable operators to build institutional networks with capacity dedicated for educational and government use. Comcast's $6 million INET connects over 240 public facilities and serves over 20 public agencies. SER 337-338.

Under a Portland-Comcast contract, City staff who operate IRNE also manage Comcast's INET customer relations. INET users pay about $1 million per year for services. The City receives $650,000 for management activities and $400,000 goes to Comcast for providing transmission. Petitioner's Appendix 11a-12a.

The INET uses no IRNE facilities and vice versa. Nor does the INET use any in-kind facilities. *Id.* The INET is interconnected with IRNE, so INET users can also use IRNE to reach other networks. SER 432.

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[7] As an economic expert testified: "The in-kind payments . . . amount to a miniscule proportion of the total value of IRNE and confer no measurable competitive advantage to the City." SER 208.

For example, Portland schools are all connected by the INET, and IRNE connects school headquarters to a TWT Internet hotel. The result: each individual school has a fast Internet connection, SER 086, 249, and TWT has an Internet customer.

TWT makes much of the fact that the City does not charge itself franchise fees for money it earns helping Comcast run the INET. That is irrelevant for purposes of §253, which addresses regulation of telecommunications providers, not cable companies. TWT never tells the Court that INET is part of a cable system in City rights-of-way that is owned by Comcast, not the City, and that it uses no in-kind duct. Nor does TWT mention that cable institutional networks, to provide low or no-cost capacity to local governments, are specifically authorized by federal law. And finally, even if the INET was owned by the City, not by Comcast, TWT presents no legal or philosophical support for the notion that the City, which owns the rights-of-way, should in any case have to pay itself to use its rights-of-way, anymore than TWT pays itself to use its property. *Cf. Puget Sound Power v. City of Seattle, Wash.*, 291 U.S. 619, 624-25 (1934) (municipal utility need not charge itself same fees and taxes assessed against private enterprises).

D. Portland's Open Telecommunications Market

There are 21 telecommunications providers operating in the City under franchise or permit. Petitioner's Appendix 12a. Portland has never denied a telecommunications franchise application, and no applicant has ever declined to pursue a franchise because of any proposed franchise condition. *Id.* at 13a. The City has more telecommunications competitors than any other part of Oregon. SER 072-074. Expert Alan Pearce concluded: "[c]ompetitive entry has been enabled by the city's pro-competitive policies. . . . Portland has fully lived up to the goals and spirit of the Telecommunications Act of 1996." SER 221, 235.

The plaintiffs below, including TWT, all operate successfully in Portland's market. TWT came to Portland in 2002, and by 2005, Portland was one of TWT's top ten markets nationwide, SER 024-025, 052-056, and its revenues had doubled. Petitioner's Appendix 13a. Like all telecommunications providers in the City, TWT pays a franchise fee or privilege tax, which it merely passes on to its customers. TWT has never provided in-kind duct to the City. The district court could find no basis in the record to conclude that City regulatory actions even "may prohibit" the provision of telecommunications by TWT.

E. The Company's "Loss Of Business"

Since TWT can show no adverse impact on its operations from the City's regulatory actions, it focuses instead on the City's non-regulatory participation in the market place – its operation of IRNE and its arrangements with Comcast to provide INET services to governments and schools. TWT declares that it has lost customers to IRNE and the INET because those networks charge lower prices for data transmission than TWT charges.

The district court simply discerned no facts to support TWT's claim that the City's operation of IRNE (using in-kind conduit) had excluded TWT from any significant telecommunications market.[8] To the contrary, the trial court found that the use of in-kind conduit did not significantly lower IRNE prices, Respondent's Appendix 4a, and that IRNE's operation had no significant effect on the local telecommunications market. Petitioner's Appendix 23a.[9]

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[8] The district court noted that the plaintiffs never submitted evidence about relevant "markets," Petitioner's Appendix 23a, and co-plaintiff Qwest went so far as to warn the court away from an analysis of "relevant market impact." Respondent's Appendix 6a-7a.

[9] TWT officials cited one customer it "lost" to IRNE and opined that "given the lower [IRNE] prices . . . , TWT *may* be effectively prohibited from providing these services." *See* QER 00103. But in another case, TWT actually gained a new client when IRNE connected Portland schools to TWT's "internet hotel." SER 250. Amicus Qwest asserts that it has lost numerous customers because of IRNE's lower costs. The district court

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As a matter of law, in any case, the district court properly found that charging low prices for telecommunications services (as the City is alleged to do) is not a "legal requirement" prohibiting provision of service, subject to preemption under §253. Providing customers high quality, low cost service is nothing more than old-fashioned competition, which the 1996 Act explicitly intended to foster. Petitioner's Appendix 23a. Further, of course, Comcast's provision of low cost INET service in cooperation with the City was specifically sanctioned by Congress in the Cable Communications Act of 1984.

III. REASONS FOR DENYING THE WRIT

A. There Is No Need To Review The Ninth Circuit's Memorandum Opinion Regarding The Preemptive Scope Of Section 253

1. TWT Raises No Issues Beyond Those Already Considered And Rejected When The Court Denied Certiorari In *Sprint Telephony*

During the Court's last Term, telecommunications providers sought review of an en banc Ninth

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found no support for that claim. Respondents' Appendix 4a. The record showed that Qwest's "lost customers" now use Comcast INET circuits, not IRNE connections, and that INET services actually cost *more* than the previous low-quality Qwest services. SER 248-251, 260-268, 374-375.

Circuit opinion, *Sprint Telephony v. San Diego County, supra*, and an Eighth Circuit opinion, *Level 3 Commc'ns, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528 (8th Cir. 2007), *cert. denied*, 129 S.Ct. 2859 (2009), on essentially the same grounds as TWT seeks certiorari here. There is no reason for the Court to review TWT's case after refusing to hear those other actions.

In *Sprint*, the Ninth Circuit overruled its own decision in *Auburn v. Qwest,* which had created an unmanageable preemption standard, the "may prohibit" test. In overruling *Auburn*, the Ninth Circuit held that "a plaintiff suing . . . under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Sprint Telephony,* 543 F.3d at 577.

Sprint sought review from this Court, not to defend the flawed *Auburn* test, but because, Sprint said, the Ninth Circuit's revised rule would require preemption of a local regulation "only if [the regulation] . . . effects a complete ban on the provision of [telecommunications] service." As the Solicitor General noted in urging rejection of the Sprint petition, that is simply not what the Ninth Circuit has said. Instead, the Ninth Circuit has essentially endorsed the FCC's own interpretation of §253 announced by the FCC in *In re Cal. Payphone, supra*. Under both the FCC and Ninth Circuit precedent, "Section 253 can preempt legal requirements that fall short of a complete ban on service," Brief of United States in Case Nos. 08-626 and 08-759 at 14, if they "materially

inhibit[ ] or limit[ ] the ability of any competitor . . . to compete in a fair and balanced legal and regulatory environment." *In re Cal. Payphone, supra*, 12 F.C.C.R. at 14,206.

In this case, TWT attacks the same "straw man," as did Sprint. TWT claims that the circuit court's opinion in this case announces a rule under which a local regulation is preempted "only if it entirely prevents the carrier from operating in the local market." Petition at i. But nothing in the Ninth Circuit's unpublished memorandum says that and nothing indicates an intention to depart from the circuit court's own *Sprint* test and the FCC's *In re Cal. Payphone* test. When it is not tendentiously seeking to pour dangerous implications into the Ninth Circuit memorandum, TWT itself admits that the three-page opinion in this case contains "[no] analysis or explanation," merely "citing the recent *Sprint Telephony* decision," and fails to "state a test for what constitutes an effective prohibition." Petition at 13-14. At most what TWT can say is that despite this analytical silence, the Ninth Circuit "*suggest[ed]* that a local action must completely prevent a carrier from operating before it runs afoul of Section 253(a)." Petition at 14 (emphasis added).[10]

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[10] The one sentence in the Ninth Circuit opinion that concerns TWT reads as follows:

> The in-kind requirements that Qwest challenges, which were provided to the City twelve years ago, do not vest the City with broad discretion, and they do

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TWT's admission that the Ninth Circuit's unpublished opinion contains no substantive analysis is fatal to its petition. In effect, TWT asks that its petition be granted based on nothing more than concerns about ambiguous suggestions in an unpublished opinion relying upon a previous case that correctly stated the law. This Court should not grant certiorari on such flimsy grounds. TWT simply reads non-existent implications into the Ninth Circuit's exceedingly brief opinion.

The sentence in the Court of Appeals' memorandum opinion that most concerns TWT relates not to TWT's own case, but to the in-kind obligations of its co-plaintiff QCC. QCC has not sought certiorari. Further, on the record QCC made, the district court could find no basis for preemption even under the lenient *Auburn* test. QCC contributed in-kind duct nearly ten years before it filed suit. The duct was used by Portland for traffic signal cable. QCC had no obligation to provide more in-kind duct ever again. Petitioner's Appendix 13a-14a, 31a. The payment of in-kind compensation in 1997 had no effect whatsoever on QCC's current or future ability to offer telecommunications.

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not have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation. *See Sprint Telephone PCS, LP v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc) (setting the standard for whether a requirement violates the Telecommunications Act).

Since QCC could not prevail under the lenient *Auburn* standards, *a fortiori*, it could not obtain a reversal when the standards for preemption, revised under the *Sprint* case, had grown more demanding. The Ninth Circuit's one sentence affirming summary judgment against QCC and summarizing the district court record does not create a new "post-*Sprint*" test that requires further review by this Court.

TWT's case against its own in-kind franchise compensation was, if anything, even weaker than QCC's. Its franchise allows the City to request in-kind duct, but the City has *never done so*. The district court, applying *Auburn*, preempted the unimplemented in-kind compensation provision, not because TWT showed the provision affected its ability to provide services, but solely because the franchise granted the City too much "discretion" to request duct in the future.[11]

Given the record and the elimination of the *Auburn* "may prohibit" test, the panel properly reversed the district court and upheld the in-kind provision in TWT's franchise.[12] The unexercised

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[11] The district judge also concluded that the TWT duct requirement was not "limited." That was simply an error in reading the contract. The City may demand in-kind duct – but it may only ask for one or two pipes and only when and where TWT is building an extension to its own underground system in City streets. 2ADD0031.

[12] TWT argues that it is harmed by the City's use of in-kind duct obtained through its contracts with other franchisees. Even if that were true (and the district court found no such harm),

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"discretion" Portland retained under the franchise has not prohibited or effectively prohibited TWT from providing any telecommunications services. In this regard, TWT is situated exactly as was Sprint in *Sprint v. San Diego, supra*.

Finally, with respect to TWT's franchise fee of 5% of gross revenues, the district court concluded that, given the undisputed facts, TWT simply "failed to show that the 5% fee may have the effect of prohibiting the provision of telecommunications service." Petitioner's Appendix 33a. TWT carries on at some length about the difference in the method used to calculate its franchise fee and the method established by Oregon law to calculate the privilege tax charged to the incumbent (and amicus) Qwest Corporation. TWT seems to argue that the difference itself amounts to a prohibition under §253.

To the contrary: Absent a showing that TWT's fees materially affect the "economic viability" of its Portland operations, *In re Cal. Payphone, supra,* differences in TWT's fees and those paid by Qwest are simply immaterial. Under the FCC and virtually unanimous judicial interpretation of §253, any differences in fees charged to different providers are not relevant to the inquiry until a plaintiff has first

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TWT cannot ask a court to preempt the City's *use* of its property (duct work); such use is not a "legal requirement" subject to §253. Further, TWT cannot seek to preempt the contracts of companies – indispensable parties – who are not in the case.

shown an effective prohibition under §253(a). Where a preliminary showing of prohibition is made, then the defending local government can defend even prohibitory requirements as long as they are "fair and reasonable" and "nondiscriminatory" compensation for right-of-way use. 47 U.S.C. §253(c). "Section 253(c) 'derives meaning only through its relationship to Section 253(a)' and 'standing alone cannot form the basis of a cause of action against a state or local government.'" Brief of United States, Nos. 08-626 and 08-759 at 19, quoting *Level 3 Commc'ns L.L.C. v. St. Louis*, *supra,* and *Bell South Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187, 1189 (11th Cir. 2001).

In this case, the district court reviewed the facts and could find no §253(a) effective prohibition, not even circumstances that "may prohibit" services. Thus, the second analytical step under §253(c) was unnecessary. In an abundance of caution, however, the district court nonetheless reached the secondary issues under §253(c) and concluded that the City's franchise fees were fair, reasonable, and nondiscriminatory. TWT's fees are not identical to Qwest's, but they achieve "rough parity," which is all the law requires. Petitioner's Appendix 34a, adopting reasoning of *City of Portland v. Electric Lightwave, Inc., supra*; *TCG New York, Inc. v. City of White Plains, N.Y.*, 305 F.3d 67 (2nd Cir. 2002).

In the end, TWT's real complaint appears to be not with the Ninth Circuit's decision but with the district court's analysis of the undisputed facts and

its application of the lenient "may prohibit" preemption test that TWT itself has long espoused. Thus, contrary to TWT's suggestion, the extensive record in this case actually makes it a strikingly bad vehicle to review the proper standards of preemption under §253. This case would have to be decided in the City's favor no matter what §253 standard applied.

The district court simply rejected the evidentiary basis for TWT's repeated claim that it was even partly excluded from the market, harmed economically by the City's actions, or "may be prohibited" from providing service sometime in the future. Now, evidently, TWT expects this Court to plow through the massive record made below and second-guess the lower court's assessment of the facts. For only by rejecting the factual underpinnings of the lower courts' decisions could this Court reach and address TWT's suggested legal "questions presented." This Court should decline TWT's invitation to engage in such post hoc factual analysis.

2. The Ninth Circuit Opinion Creates No Split In The Circuits' Interpretations Of Section 253 And Is Consistent With FCC Precedent

TWT mischaracterizes the Ninth Circuit opinion in this case. By doing so, it can argue that the Ninth Circuit is out of step with the FCC and other circuits.

But the circuit court's decision is nothing more than an application of, not a radical departure from,

the holding in *Sprint Telephony*. The Court has already heard and rejected arguments that *Sprint* creates a split in the circuits and contradicts FCC precedent. The FCC does not perceive that split, and the arguments made by the United States as amicus to this Court in *Sprint* are fully applicable in this case and need not be repeated at length. *See* Brief for United States, Nos. 08-626 and 08-759. The memorandum opinion in TWT's Ninth Circuit appeal does nothing to alter the existing administrative and judicial consensus on how to apply §253, a consensus the FCC has already identified for the Court. The Court need not review the Ninth Circuit's ruling in this case in order to resolve a split among the circuit courts.

3. The Court Need Not Interject Itself Into The Process Of Defining When A Regulation Has The "Effect Of Prohibiting" The Provision Of Service

TWT suggests that the Court should intervene now to "clarify . . . the standard for establishing that a local requirement has the 'effect of prohibiting' telecommunications service." Petition at 18. To the contrary, this Court's involvement in that question is both premature and unnecessary.

The FCC has already explained in its amicus brief in the *Sprint* and *Level 3* cases that the federal courts have already reached a general consensus on

how to interpret and apply §253. There is no conflict among the circuits – except for the imaginary conflict that TWT would create by reading "suggestions" into the unpublished opinion in this case.

Putting aside TWT's overheated rhetoric about what the Ninth Circuit did here, there is no indication that the federal courts are at sea or require early instruction from this Court on how to apply §253. The circuits have coalesced around an interpretation of §253 based on the statute's plain language and the decisions from the FCC, an interpretation which counsels preemption of local requirements when they actually prohibit or "effectively prohibit" the provision of telecommunications. There are numerous cases in which courts have preempted local requirements that were not, on their face, prohibitory, but nonetheless had indirect or "effective" prohibitory consequences.

In addition, the FCC enjoys express authority to preempt state and local requirements that violate §253(a). 47 U.S.C. §253(d). The FCC has already advised the Court that it will act to insure uniformity if there develops "significant divergence in outcomes among the circuits [regarding §253]." Brief of the United States, Nos. 08-626 and 08-759 at 18. That makes even less necessary any Supreme Court review of the unpublished opinion in this case.

B. The Court Need Not Review The Ninth Circuit Application Of The Tax Injunction Act

TWT challenged its City of Portland 5% franchise fee. The fee is set by Portland's City Council, it applies to TWT and any other enterprise with a similar franchise, and the proceeds flow into the City's general fund.

The Ninth Circuit refused to hear TWT's challenge to the franchise fee, holding that such a challenge was foreclosed in federal court by the Tax Injunction Act (TIA). 28 U.S.C. §1341. In doing so, the Ninth Circuit followed its own TIA precedents which, in turn, are consistent with those of circuits all across the country.

1. There Is No Conflict Among The Circuits' Interpretations Of The TIA

TWT can point to no circuit court that has interpreted the TIA in a manner contrary to the Ninth Circuit's. The Ninth Circuit is the first and only circuit to consider the specific question of whether the TIA forecloses federal court jurisdiction over §253 preemption challenges to local gross revenue franchise fees. On the other hand, in a significant judicial development ignored by TWT, other circuits, outside the context of the Telecommunications Act, have held that gross revenue franchise fees *are* taxes for purposes of the TIA. *See* discussion, *infra*.

Finding no express conflict among the circuits, TWT instead argues that there is an "implicit" conflict among the circuits because other circuit courts have considered and preempted various local "right-of-way fees" on telecommunications providers without ever mentioning the TIA. Having substantively judged preemption claims against right-of-way fees, TWT says, those circuits must have silently considered the TIA jurisdictional question and decided it in conflict with the Ninth Circuit ruling.[13]

Circuit court silence is no basis upon which to grant certiorari. Unless other circuit courts have had a chance openly to consider and decide a question of law, it is presumptuous to assume that silence represents a considered holding on an issue of law never presented to those circuit courts.

TWT's argument also ignores the nuances of the many §253 cases and ignores the care with which courts assess the details of a TIA defense. According to TWT, other courts have reviewed "right-of-way fees" under §253 without pausing to consider the applicability of the TIA. But there are numerous kinds of rights-of-way fees, many of which differ significantly from the City's franchise fee.

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[13] Amicus Qwest cites the case of *Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997). That case also did not interpret the TIA and did not determine if franchise fees should be labeled taxes for purposes of the TIA.

The Ninth Circuit did not hold, and has never held, that all local fees imposed on telecommunications providers are "taxes" under the TIA and thus exempt from federal court review. Indeed, in other cases, it has used §253 to preempt other kinds of local telecommunications "fees." *City of Auburn v. Qwest, supra; Qwest Commc'ns Corp. v. City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006). In this case, the Ninth Circuit said only that the City of Portland's 5% contractual franchise fee should be classified as a tax for purposes of application of the TIA. The decision does not conflict with any decision of any other circuit court.

Indeed and to the contrary, when other courts have specifically addressed the issue presented in this case, they have agreed with the Ninth Circuit: street use franchise fees are taxes for purposes of the TIA. No circuit court has ever held to the contrary. *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 376 (3d Cir. 1978); *Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547, 549 (2nd Cir. 1991), *abrogated on other grounds by Jefferson County v. Acker*, 527 U.S. 423, 434 (1999); *see also, City of Chattanooga, Tenn. v. Bellsouth Telecomms., Inc.*, 1 F. Supp. 2d 809 (E.D. Tenn. 1998); *Diginet, Inc. v. Western Union ATS, Inc.*, 845 F. Supp. 1237 (N.D. Ill. 1994); *Independent Coin Payphone Ass'n, Inc. v. City of Chicago*, 863 F. Supp. 744 (N.D. Ill. 1994); *cf. Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 740-41, 744, n. 24 (D.C. Cir. 1986) (cable

franchise fees of 3-5% of gross revenues probably constitutes a tax).[14]

There is no split in the circuit courts on this issue. There are three circuits that have explicitly considered whether street use franchise fees are "taxes" for purposes of the TIA. All those circuits, the First, Third, and Ninth, agree that franchise fees should be treated as taxes for purposes of the TIA.

2. The Ninth Circuit Decision Applied The Tax Injunction Act Test Uniformly Used By The Circuit Courts

In this case, the Ninth Circuit decided the City's franchise fee was a "tax" for purposes of the TIA by applying the test enunciated in *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996) and *Qwest v. City of Surprise*, 434 F.3d 1176, 1183 (9th Cir. 2006). *Bidart* adopted a three-prong test for identifying a tax under the TIA: (1) who adopted the fee (if a legislative body, it is more probably a tax);

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[14] One district court held that a particular cable television franchise fee was not a "tax" for purposes of the TIA. *Time Warner Entm't v. City of Lincoln, Nebraska*, 360 F. Supp. 2d 1012, 1017 (D. Neb. 2005). The court decided the fee was not a tax because it assessed fees on Time Warner revenues that had nothing to do with provision of cable service in Lincoln. The court declared, however, that if, as in this case, "the franchise fees were assessed in the amount of five percent of Time Warner's gross receipts from cable subscribers within the City's jurisdiction, then the Court would agree . . . that the franchise fees are a 'tax.'" *Id.*

(2) to whom it applies (if it has broad reach, it is more probably a tax); and (3) how funds are used (if funds are placed in the general fund, it is more probably a tax). If the first two factors are not dispositive, the last test is the most important because the primary purpose of the TIA is to prevent federal courts from interfering with "the flow of central revenues" to state and local governments. *Bidart*, 73 F.3d at 932; *see also Rosewell v. LaSalle Nat'l Bk.*, 450 U.S. 503, 527 (1981).

The Ninth Circuit *Bidart* test conforms to the "tax" test under the TIA of the six other circuits that have spoken on the subject. *San Juan Cellular Tel. Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992); *Keleher*, 947 F.2d at 549; *Robinson Protective Alarm Co.*, 581 F.2d at 376; *Wright v. McClain*, 835 F.2d 143, 144-45 (6th Cir. 1987); *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000); *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000).[15]

There is no split in the circuits on how to interpret the TIA. The Ninth Circuit applied the test uniformly used by all the circuits and decided the City's franchise fee was a "tax" under the TIA.

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[15] In *San Juan Cellular*, 967 F.2d at 685, an *administrative agency* imposed a 3% gross proceeds fee on cellular providers and deposited the fee into a *special fund* used only to finance agency activities. Then-Chief Judge Breyer held that under those circumstances the fee was not a "tax" for purposes of the TIA.

3. The Ninth Circuit Ruling Does Not "Eviscerate" Section 253(a)

TWT claims that the Ninth Circuit determination that Portland's franchise fee is a "tax" for purposes of the TIA "eviscerates" §253 and allows municipalities to "impose financial burdens in the guise of a tax." TWT's concern is misplaced and vastly overstated.

By ruling that the City's franchise fee is a "tax" under the TIA, the circuit court did no more than decide where a §253 challenge to franchise fees is to be heard. The TIA simply directs federal courts to decline jurisdiction over a case that would rule on the legality of a state or local tax. But TWT or others can still seek review in state court.

Moreover, as the case law demonstrates, telecommunications firms have used §253 to seek preemption of a wide variety of local regulations, not just those related to fees and taxes. If the TIA closes federal courts to plaintiffs challenging state and local taxes, federal courts remain open to challenges to all the other local or state regulations and fees that the companies find "prohibitory."

The legal issue that appears most to concern TWT, in fact, simply was never before the Ninth Circuit and cannot therefore be reviewed by this Court. TWT notes that the Telecommunications Act itself contains a clause directing that the law "not be construed to modify, impair, or supersede . . . any State or local law pertaining to taxation." Telecommunications Act of 1996, §601, 110 Stat. 143, 47 U.S.C.

§152 note. TWT warns that if the word "tax" for purposes of §601 (which protects taxes as a substantive matter) is interpreted to mean the same thing as the word "tax" for purposes of the TIA (which protects taxes on a jurisdictional basis), then §601 may be interpreted substantively to foreclose federal jurisdiction of §253 suits seeking to preempt local taxes and franchise fees even in state court.

TWT's concern does not justify review by this Court. The Ninth Circuit did not hold that §601 "taxes" were the same as TIA "taxes." The issue was never presented to it for decision. All the Ninth Circuit did in this case was to send TWT and similar plaintiffs to state court to challenge taxes as that term is broadly interpreted in the TIA. Oregon state courts provide an alternative "plain, speedy, and efficient" avenue to review local taxes under §253. *AT&T v. City of Eugene,* 177 Or.App. 379 (2001).

If TWT's real question is how courts should interpret §601 of the Telecommunications Act, it simply cannot be answered in this case. Granting this petition for certiorari will not provide a vehicle to address the issue.

4. The 1996 Telecommunications Act Did Not Repeal Or Replace The TIA

.e Court has described the TIA "as a . . . 'broad juris.ictional barrier.'" *Arkansas v. Farm Credit Services of Cent. Arkansas*, 520 U.S. 821, 827-28 (1997). It has warned that:

> Given the systemic importance of the federal balance, and given the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text.

Fundamental to any statutory interpretation, of course, is the principle that "repeals by implication are not favored" and will not be presumed unless the "intention of the legislature to repeal [is] clear and manifest." *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (internal quotation marks omitted).

> We will not infer a statutory repeal "unless the later statute 'expressly contradict[s] the original act'" or unless such a construction "is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all."

Traynor v. Turnage, 485 U.S. 535, 548 (1988) (citations omitted).

These principles have been applied by the circuit courts in rejecting assertions that later congressional acts have impliedly repealed the jurisdictional protections of the TIA. Instead, courts refuse to "carve out exceptions to the Tax Injunction Act unless Congress clearly expresses an intent to create an exception." *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327, 328 (9th Cir. 1989), citing *Ashton v. Cory*, 780 F.2d 816, 822 (9th Cir. 1982); *see also Bank of New*

England Old Colony v. Clark, 986 F.2d 600, 602-03 (1st Cir. 1993).[16]

TWT asks this Court to conclude that in passing the Telecommunications Act Congress intended to repeal the TIA with respect to state or local taxes related to telecommunications. There is simply no basis to find that Congress "clearly and manifestly intended" that result.

1. In §601 of the 1996 Act, Congress explicitly protected state and local taxes from preemption under the Act. Given this congressional concern to protect the substance of state and local taxes, the Act surely cannot be read silently to repeal long-standing jurisdictional protections for state and local taxes. This is true irrespective of whether the definition of "tax" is identical between the TIA and the Telecommunications Act.

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[16] TWT relies on *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 472-473 (1976), to suggest that the normal rules against "implied repeals" do not apply to the TIA, arguing that an "unequivocal statement" of intent to repeal or supersede the TIA is not required. This is a serious misreading of *Moe*, which protected the rights of an Indian Tribe to bring suit in its own name to protest improper application of state tax laws where its trustee – the United States government – could bring the suit but had failed to do so. The case is best understood, as Justice Kennedy has explained, as permitting a federal challenge to a state tax by a Tribe "*only* because a second federal statute [28 U.S.C. §1362] granted *sweeping* federal-court jurisdiction where an Indian tribe was a party." *Arkansas*, 520 U.S. at 828 (emphasis added).

2. The Telecommunications Act contains no provisions establishing explicit federal judicial jurisdiction over §253 preemption claims. Courts have heard the claims, instead, under general federal question or diversity jurisdiction.

3. Section 253 itself evinces no explicit intent to preempt local taxes or fees. It seeks, in general, to preempt "state or local statute[s], . . . regulations, or . . . legal requirement[s]." Section 601 then makes clear that §253 preemption cannot be used against taxes.

4. There is no mention of the Tax Injunction Act anywhere in the lengthy legislative history of the Telecommunications Act.

5. In the legislative history cited by TWT, Senator Boxer announced that she preferred, in general, that local federal courts, not the FCC, hear §253 preemption claims. Her purpose was to protect local governments from the obligation to defend themselves in the distant federal administrative venue. 141 Cong. Rec. S 8171 (daily ed. June 12, 1995). One searches in vain, however, for any statement by Senator Boxer or any other member of Congress even intimating that, while protecting localities from distant administrative hearings, at the same time they intended to repeal the TIA's long-standing jurisdictional limits

> on federal court interference in local revenue raising activities. To find intent to repeal the TIA in this Congressional silence would breach every rule of statutory interpretation announced by this Court.

IV. CONCLUSION

The Court should deny TWT's petition for certiorari. The unpublished opinion of the Ninth Circuit raises no legal issues requiring this Court's review.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TIME WARNER TELECOM OF OREGON, LLC, and QWEST COMMUNICATIONS CORP., Plaintiffs, v. THE CITY OF PORTLAND, Defendant.	CV 04-1393-PA **OPINION** (Filed May 10, 2006)
QWEST CORP., Plaintiff, v. THE CITY OF PORTLAND, Defendant.	CV 05-1386-PA **CONSOLIDATED CASES**

PANNER, J.

Plaintiff Qwest Corp. (Qwest) sells telecommunications services in Oregon. Qwest has a temporary revocable permit with the City of Portland (the City) that allows Qwest to install and operate telecommunications systems in City streets.

In this action against the City, Qwest claims that the City's operation of a fiber optic network, the Integrated Regional Network Enterprise (IRNE), violates federal law, and that the City illegally provides telecommunications services outside the City limits.

The parties move for summary judgment. I grant the City's motion and deny Qwest's motion.

DISCUSSION

In the companion case, *Time-Warner v. City of Portland* (*Time-Warner*), this court held that the Telecommunications Act of 1996, 47 U.S.C. § 253, did not preempt IRNE's sales of telecommunications services to other governments and public schools. In the following discussion, I assume familiarity with the *Time-Warner* opinion. Because Qwest's motion for summary judgment was argued after this court issued the *Time-Warner* decision, Qwest's motion has become in effect a motion to reconsider this court's prior rulings on IRNE's validity.

I. In-Kind Contributions

Qwest, like the plaintiffs in *Time-Warner*, attacks the City's use of in-kind contributions from telecommunications franchisees to help create IRNE's fiber optic network. Qwest characterizes in-kind contributions as "extortion," and claims that they give the City an unfair competitive advantage over private telecommunications providers.

A. Issue Preclusion

Qwest argues that Magistrate Judge Ashmanskas's opinion in *City of Portland v. Electric Lightwave, Inc.*, Civ. No. 03-538-AS (D. Or. May 5, 2005) (*ELI*), bars

the City from contending here that in-kind provisions are not preempted. Qwest relies on the doctrine of issue preclusion. To establish that issue preclusion applies, Qwest bears the burden of showing that the issue litigated and decided in *ELI* was identical to the issue litigated here. *See State Farm Fire & Cas. Co. v. Century Home Components,* 275 Or. 97, 104-05, 550 P.2d 1185, 1188-89 (1976).

In *ELI*, Judge Ashmanskas held that § 253 preempted the in-kind provisions of Electric Lightwave's franchise agreement with the City. That ruling was based on an analysis of the specific franchise agreement at issue there. Judge Ashmanskas did not rule that all in-kind provisions are preempted by § 253. Whether § 253 preempts an-kind provision on the precise wording of the particular provision and on the franchise agreement as a whole. Because the issue litigated in *ELI* was not identical to the issue here, the decision in *ELI* has no preclusive effect.

B. The Challenge to In-Kind Provisions Fails

Qwest characterizes in-kind contributions as subsidies. I agree, however, with the City's expert economist, Ed Whitelaw, that the in-kind contributions here are not subsidies. Franchisees provide in-kind contributions to the City in exchange for the valuable right to use the City's streets for telecommunications networks. *See TCG New York, Inc. v. City of White Plains,* 305 F.3d 67, 80 (2d Cir. 2002) (cities "retain

the flexibility to adopt mutually beneficial agreements for in-kind compensation").

Qwest contends that in-kind contributions "have the effect of lowering IRNE's prices on competitive services by 50%." Qwest Supp. Submission 2. However, the record shows that in-kind contributions supply only about 10% of IRNE's fiber, and that the value of the in-kind contributions is a small fraction of the City's total investment in IRNE. The City's use of in-kind contributions does not explain why IRNE is able to charge half of what Qwest charges for comparable services.

Regardless of how much in-kind contributions lower IRNE's prices, Qwest has not shown that IRNE's prices may have the effect of prohibiting the provision of any telecommunications service. *See Qwest Communications Inc. v. City of Berkeley,* 433 F.3d 1253, 1256-57 (9th Cir. 2006) (telecommunications plaintiff must show only that a regulation or legal requirement may prohibit it from providing a telecommunications service). A customer's decision to purchase from IRNE rather than Qwest is not a prohibition or potential prohibition that would fall within the scope of § 253 preemption.

II. Intergovernmental Agreements

Like the plaintiffs in *Time-Warner,* Qwest attacks the City's use of intergovernmental agreements (IGAs) in creating IRNE and in providing telecommunications services to governments and public schools.

Qwest claims it is not challenging the IGAs themselves, but the City's use of assets obtained through IGAs.

To help create IRNE, the City, with the Oregon Department of Transportation and the Tri-Metropolitan Transportation District (Tri-Met), formed the Cooperative Telecommunications Infrastructure Committee (CTIC), through an IGA. CTIC members share fiber, providing 38% of IRNE's network. Qwest contends that the CTIC IGA gives the City an unfair advantage over private telecommunications providers.

Qwest's challenge to IGAs fails for the same reasons that the plaintiffs' challenge failed in *Time-Warner*. Nothing prevents Qwest from entering into similar resource-sharing agreements with other private carriers or with governments. In any event, § 253 does not apply here because the City's use of fiber through the CTIC IGA is not a "regulation" or "legal requirement" imposed on Qwest or any other private carrier.

Nor is the fiber obtained through the CTIC IGA "free" to the City, as Qwest argues. The IGA requires that the parties share their resources, creating a mutually beneficial barter relationship.

Qwest claims that the City improperly circumvents public bidding when the City enters into IGAs with other governments for the sale of IRNE's services. However, the statutes authorizing IGAs specifically exempt IGAs from public bidding requirements. Or. Rev. Stat. § 279A.025(2)(a).

III. The Relevant Market

IRNE sells telecommunications services only to local governments and public schools. The City states that it has no intention of selling IRNE's services to any private businesses or individuals. Under these facts, Qwest can portray IRNE as a viable competitor only by defining the market as narrowly as possible. This is a time-honored tactic used by plaintiffs in antitrust litigation.[1] Here, the tactic is out of place because the concept of a relevant market has no place in determining whether § 253 preemption applies. Regardless of IRNE's market power, a governmental agency's decision to purchase telecommunications services from IRNE is not equivalent to an actual or a potential prohibition of a telecommunications service. (That is assuming that IRNE's conduct in the market could be considered a "regulation" or "legal requirement.")

Qwest refers in its briefs to "the relevant market" and to "the government and education market in Portland." *See* Qwest Opp. to Mot. for Summ. J. 4 ("The relevant market in this case is not the national telecommunications market, or even the Portland

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[1] *See, e.g.*, Robert Pitofsky, *New Definitions of the Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805, 1816, (1990) ("There will almost always be classes of customers with strong preferences but to reason from the existence of such classes to a conclusion that each is entitled to a separate narrow market definition grossly overstates the market power of the sellers.").

market. IRNE only operates in the Portland governmental and educational market. . . ."); *id.* at 9 ("The only relevant market is the governmental and educational market in Portland"); Qwest Mem. in Supp. of Summ. J. 18 ("IRNE and [Qwest] compete in the same government and education market." (footnote omitted)); Qwest Reply in Supp. 6 ("IRNE competes in the marketplace for public-sector customers."). Qwest claims IRNE has caused Qwest to lose "11 percent of [its] annual revenue in the government and education market in the Portland area." Qwest Mem. in Supp. 19 (claiming that Qwest loses about $50,000 per month because of competition from IRNE).

Because of these frequent references to the relevant market, at oral argument I asked counsel for Qwest whether any legal authority defined the "relevant market" for the preemption analysis under § 253. Counsel knew of no such authority. In a supplemental brief filed after oral argument, Qwest stated that it was "concerned" that this court "has or will adopt a 'relevant market impact' standard." This court has no such intention.

IV. IRNE's Service to Non-Inhabitants

Qwest contends that because IRNE provides services outside City limits, the City is violating section 10-102 of the City Charter, which allows the City to operate projects like IRNE "for the purpose of serving the City and the people thereof for uses public

and private." Qwest contends that the City is also violating Or. Rev. Stat. § 225.110, which allows cites to operate telephone systems: "When authorized by its charter . . . , a city may purchase, build, own, operate and maintain telephone or telegraph systems within or without its boundaries, for the benefit and use of its inhabitants at cost or for profit."

Neither the City Charter nor any Oregon statute prohibit the City from providing services through IRNE to other government entities outside the City limits. Connections to governments outside City limits benefit the City because the connections are two-way. For example, sharing law enforcement information with the City of Hillsboro benefits both cities. IRNE receives revenue from IRNE's customers, which also benefits the City. Most importantly, neither the statute nor City Charter provision can be read as restrictively as Qwest argues. The State authorizes the City to own property for any "general benefit and use of the people within or without the city." Or. Rev. Stat. § 223.005(2).

CONCLUSION

Qwest's motion for summary judgment (#169) is denied. The City's motion for summary judgment (#162) is granted.

DATED this 10 day of May, 2006.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE